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In the Supreme Court of the United States
OCTOBER TERM, 1937

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Petitioner,

vs.

STELLA JANE GAMER, as Executrix of the Will of E. Walter Gamer, Also Known as Edward W. Gamer, Deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The above named respondent objects to the granting of a Writ of Certiorari herein upon the grounds and for the reasons:

1.

That the petition filed herein does not state facts sufficient to justify the issuance of a Writ of Certiorari.

2.

That the petition herein does not show a condition to exist demanding the issuance of a Writ of Certiorari,

which condition comes within the purview or terms of Supreme Court Rules, No. 38, Subdivision B.

3.

That the petition herein is insufficient to justify the issuance of the Writ of Certiorari in that while it shows confusion in the decisions of the different Circuit Courts of Appeal, it does not show that the decision of the Circuit Court of Appeals of the Ninth Circuit in the case at bar is in conflict with any decision of the Supreme Court of the United States.

4.

That from the petition herein it appears that the decision of the Circuit Court is in accordance and follows the rule of law announced by the Supreme Court of the United States in the case of

Travelers' Insurance Company vs. McConkey, 127 U. S. 661.

5.

A Writ of Certiorari should not be issued herein because the question here involved was and is the identical question raised in the case of

New York Life Insurance Co. vs. Ross, 30 Fed. (2d) 80

which decision followed the rule announced in

Travelers' Insurance Company vs. McConkey, 127 U. S. 661

and a judgment for the plaintiff in said case upon the authority of Travelers' Insurance Company vs. McConkey was affirmed, and thereafter the appellant, New York Life Insurance Company, petitioned this Court for a Writ of Certiorari directed to the Circuit Court of Appeals for the Sixth Circuit, which petition was by this Court denied.

See

New York Life Insurance Company, Petitioner vs. Sarah Ross, Exec., 279 U. S. 852.

ARGUMENT IN SUPPORT OF ABOVE OBJECTIONS

In support of the above objections we agree that the rules of this Court contemplate where there exists confusion in the decisions of the Circuit Courts of Appeal upon a question of law which should be definitely settled, this Court will accept jurisdiction by granting a Writ of Certiorari and having the matter presented to it for decision.

The question here involved has heretofore been definitely settled by this Court in

Travelers' Insurance Company vs. McConkey, 127 U. S. 661

and likewise in

Home Benefit Association vs. Sargent, 142 U. S. 691.

These cases, many years ago, established the law applicable in cases of this kind, definitely approved the instruc-

tions given by the trial judge in the case at bar, have never been reversed, modified or criticized by this Court, and have become the settled law pertaining to actions of this character.

With the foregoing thoughts in mind no reason exists for a further review of the law as therein announced. Furthermore, the same contention here made was advanced in

New York Life Insurance Company vs. Ross, 30 Fed. (2d) 80

and the Circuit Court of Appeals of the Sixth Circuit decided said contention was contrary to the Supreme Court decisions hereinafter announced, and upon the authority of such decisions approved instructions similar to instructions given herein by the trial judge, and this Court refused to review such decisions by certiorari.

New York Life Insurance Co. vs. Ross, Exec. 279 U. S. 852.

We do not feel justified in prolonging this brief by any further citation of authorities in support of our position.

ARGUMENT

Counsel for petitioner have in their brief set forth instructions of the trial court which they claim were erroneous. We shall not indulge in any repetition thereof, but shall call the Court's attention to the following portion of the instructions not quoted in the brief or petition of counsel for petitioner. In the course of his instructions the Court said:

> "Boiled down to its final essence, that is the question that you are called upon to decide, did Walter Gamer kill himself intentionally, and if Walter Gamer *did not kill himself intentionally this woman is entitled to $20,000.00; and if he did intentionally kill himself she is not entitled to any amount in excess of $10,000.00*" (R. 255.) (Italics supplied.)

We cite the foregoing not because it is of any particular consequence in a decision of the questions here involved, but more for the purpose of advising the Court that in his instructions to the jury the trial court made it very plain that there was but one issue for the jury to decide, namely: Did or did not Walter Gamer commit suicide.

While some mention is made, and counsel assign as error, that the Circuit Court of Appeals erred in holding that the District Court did not err in overruling defendant's motion for a directed verdict, we contend that this question is no longer a debatable one inasmuch as it has twice been decided contrary to the contention of counsel for petitioner, first in

> Gamer vs. New York Life Insurance Company, et al, 76 Fed. (2d) 543,

and again in the decision which it is now sought to review,

New York Life Insurance Co. vs. Gamer, 90 Fed. (2d) .....

which opinion is a part of the record on appeal herein. (R. 328.)

In addition to the two foregoing decisions, the petition of the New York Life Insurance Company for a new trial was denied in the District Court (not officially reported.)

To avoid any possible confusion in the minds of the Court, this case, upon the first appeal, likewise involved a claim for double indemnity against the Prudential Insurance Company. Prior to the trial of this action a settlement was reached with said company, which explains the difference in the title as well as parties litigant upon the two appeals.

Under the law as we view it, these decisions preclude any further right upon the part of petitioner herein to have reviewed the decision of the trial court holding that under the facts presented the question of suicide or accidental death was for the jury, or to have reviewed the decisions of the Circuit Court of Appeals so holding.

> "The right to limit liability turns upon whether such negligence was with the owner's privity or knowledge. Both courts below, after painstaking examination of the evidence, found there was such privity or knowledge, and accordingly ruled that the claim for limitation must be denied. We accept this concurrent finding. There was sufficient evidence to support it."
>
> Kellog & Sons vs. Hicks, 285 U. S. 502, 509.

In addition, we invite the Court's attention to the decision in

Pythian Knights Council vs. Beck, 181 U. S. 49,

wherein this Court, upon facts much more indicative of suicide than those in the case at bar, held the question properly one for the jury.

DECISIONS OF THE SUPREME COURT OF THE UNITED STATES

Under the above heading counsel for petitioner make a brief reference to the decision of

Travelers' Insurance Co. vs. McConkey, 127 U. S. 661,

and then only for the purpose of contending that the law as therein announced has been reversed in later decisions by this Court. Counsel, however, failed to make mention or to call to the attention of this Court the fact that *the instructions in the case at bar, of which complaint is now made, were taken almost verbatim from those expressly approved in the McConkey case.*

A comparison of the record herein, particularly the instructions given, with that in the McConkey case, will show that said questioned instructions were expressly approved in the McConkey case, and while the McConkey case is not cited in the decision, the same rule of law was afterwards by this Court declared and approved in

Home Benefit Association vs. Sargent, 142 U. S. 691.

Neither of these cases or the rule of law therein announced has ever been disapproved, criticized or questioned by any declaration of this Court.

Counsel have cited certain decisions of this Court wherein they claim that this Court has deviated from the rule announced in the McConkey case. In view of the very excellent review of these decisions by Mr. Justice Denman in his opinion in this case (R. 328), we feel it would be futile upon our part to attempt any further effort to distinguish the decisions in the cases cited by counsel for petitioner from the decisions in the McConkey and Sargent cases. Suffice it to say, had this Court in mind, at the time such decisions were rendered, a modification or disaffirmance of the rules announced in the McConkey and Home Benefit cases, some declaration of such intention would have found itself into said decisions.

No mention of the McConkey or Home Benefit cases having been made in any of such decisions, the following rules apply:

> "A case is not overruled by an omission to mention it."
>
> U. S. vs. Moreland, 258 U. S. 433, 436.

> "The general language of a judicial opinion must be taken in connection with the point actually decided."
>
> Sterling vs. Constantin, 287 U. S. 378.

> "Always the language used in an opinion must be *read in the light of the issues presented.*" (Italics supplied.)
>
> Sinclair vs. U. S. 279, U. S. 749, 767.

As has been so well stated by Mr. Justice Denman, it is inconceivable that such was the intention.

May we quote from Judge Denman's decision:

> *"In refusing to accept such a silent submersion of the prior decision in the McConkey case, we are moved by the confusion into which the litigants and the legal profession would be thrown if the Supreme Court is deemed to overrule while it avoids the mention, much less the consideration of, a case which long ago established and has maintained a rule of law upon which they relied."* (R. 340-1.) (Italics supplied.)

To supplement said statement may we ask, what would be the result if trial courts were put in error because of the giving of instructions theretofore definitely and expressly approved by this Court?

To now reverse the rule announced in the McConkey case would create a condition in the trial courts and counsel whereby their uncertainty as to the rule to be followed in instructing juries would leave them so bewildered as to question their ability to decide upon the law to be followed.

In the Brief of counsel for petitioner is cited

Heiner vs. Donnan, 285 U. S. 312,

but therein this Court said:

> *"A reputable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof."* (Italics supplied.)

We fail to see what comfort petitioner can derive from this decision.

We shall not attempt a review of the decisions from the various Circuit Courts of Appeal cited by counsel for petitioner.

We do, however, desire to make a brief comment on the case of

Jefferson Standard Life Insurance Co. vs. Clemmer, 79 Fed. (2d) 724,

because of the insistence of counsel for petitioner that it is "one of the ablest and most instructive cases to be found in the books."

That decision recognizes that it is in conflict with the rule announced in the McConkey case, but attempts to justify its departure by the following:

> "The case, therefore, has not uniformly been recognized as binding authority for the rule that the burden of proof is upon the defendant."

True, some Circuit Courts of Appeal have refused to follow the rule in the McConkey case, but in such refusal such Courts have either ignored the McConkey decision or attempted to distinguish it. In the case at bar both the District Court and Circuit Court of Appeals chose to follow the McConkey decision, resulting in the present attempt to have this Court declare such action erroneous.

The fallacy of the reasoning in the Clemmer case may perhaps be best illustrated by a review of two decisions cited therein and stated to announce a rule of law at variance with the rule in the McConkey case. We refer to the cases of

Holt vs. U. S., 218 U. S. 245, 253,

and

Agnew vs. U. S., 165 U. S. 36.

A reading of these cases will disclose that neither is an authority for the position of the learned judge who wrote the decision in the Clemmer case.

In the Holt case the defendant requested an instruction that the law presumed the defendant innocent, and added:

> "This presumption of innocence is evidence in the defendant's favor."

Mr. Justice Holmes held that the trial judge had correctly informed the jury regarding the presumption of innocence which surrounded the defendant, and in the course of his opinion stated that the concluding sentence of the tendered instruction would have a tendency to mislead the jury.

In the Agnew case an instruction was tendered by the defendant regarding a presumption, the concluding sentence of which was:

> "This presumption is to be treated by you as evidence giving rise to resulting proof to the full extent of its legal efficacy."

and Mr. Chief Justice Fuller said that the tendered instruction had been covered by instructions given and might well have been refused because of the tendency of its closing sentence to mislead. Thus it will be seen that neither of these cases are authority for the position assumed by the learned judge that said decisions at least impliedly justified the conclusion that this Court was departing from the rule announced in the McConkey Case.

Furthermore, in

Heiner vs. Donnan, 285 U. S. 312

already referred to, this Court announced that a reputable presumption is a rule of evidence which has the effect of shifting the burden of proof, thus again placing this Court in disagreement with the decision in the Clemmer case.

It is true that in some of the decisions cited by counsel for petitioner some Circuit Courts of Appeal have not followed the decision in the McConkey case. We believe that the language of the Court in

New York Life Insurance Co. vs. Ross, 30 Fed. (2d) 80

speaks far more eloquently than would or could any language of ours in refutation of the right of District or Circuit Courts to refuse to follow the rule announced in the McConkey case. Therein it is said:

> "The charge to the jury in the court below was manifestly carefully prepared with these authorities in mind. *So far as we are advised, the McConkey case has never been qualified nor overruled in this circuit. The former is binding upon this court, and both were binding upon the District Court.* (Italics supplied.) The doctrine announced in both thus becomes the law of all cases presenting the identical question. The situation is a most appropriate one for application of the doctrine of stare decisis. If this doctrine means, as was said in The Madrid (C. C.) 40 F. 677, 679, *"That when a point has been once settled by judicial decision it forms a precedent for the guidance of courts in similar cases," precedents which cannot be distinguished should be followed until modified or overruled, and the interests*

of uniformity, certainty, and stability in the law thus promoted. (Italics supplied.) Certainty of a rule is often of equal importance with theoretical accuracy.

"We are unable to satisfactorily distinguish the case of Travelers' Ins. Co. vs. McConkey in the Supreme Court, or more especially Standard Life, etc. Co. vs. Thornton, in this Circuit, from the present action, and although, except for these cases, the charge would not seem to us properly to apply the abstract principle of law, we cannot say that the Court erred in following the doctrine announced in these decisions.

The judgment must therefore be affirmed."

In a concurring opinion by Circuit Judge Denison, he said:

"In this case, as in the McConkey case, it seems to me that, in spite of the protestations to the contrary, the burden of proof—the rise of nonpersuasion—was shifted to defendant. As I read the charge of the trial court in the McConkey Case, it was that the burden of proof to show accident, rather than suicide, was on the plaintiff, but that if the evidence of each was equally balanced, 'the law was for the plaintiff.' The Supreme Court approved both of these conclusions, plainly not regarding them as inconsistent; but the conflict of view revealed by the cases cited in Judge Hickenlooper's opinion shows that the two conclusions are not easy to reconcile."

In

Standard Life and Accident Co. vs. Thornton, 100 Fed. 582,

Judge Day, later Mr. Justice Day, in discussing the presumption against suicide, said:

> "This presumption must stand in the case, and be decisive of it, until overcome by testimony which shall outweigh the presumption. *It casts upon the defendant who claims that the death was intentional the burden of establishing it by a preponderance of testimony.*" (Italics supplied.)

Counsel next cite cases decided by the Circuit Court of the Ninth Circuit, in which they claim the rule as announced in this case was disapproved. Again we invite the Court's attention to the decision of Mr. Justice Denman, which we believe answers the contention of counsel for petitioner herein. Counsel, in support of their contention, quote from the case of

> New Amsterdam Casualty Co. vs. Breschini, 64 Fed. (2d) 887,

but as was said by Circuit Judge Denman, the Court there held that the evidence established suicide, and required an instructed verdict for the insurer. Hence, the instruction concerning the burden of proof should not have been given, but a verdict should have been instructed for the defendant.

In a later case from this Circuit

> Wells Fargo Company vs. Mutual Life Ins. Co., 66 Fed. (2d) 890, 893,

the Court in its decision cited with approval the decision of

> Travelers' Insurance Co. vs. McConkey, 127 U. S. 661,

and affirmed a judgment for the plaintiff.

Another case to which we desire to call the Court's attention is

New York Life vs. Miller, 81 Fed. (2d) 263 (decided Dec. 9, 1935),

in which the Court of Appeals for the District of Columbia says:

> "It is settled law that a suicide clause in a policy of insurance must be given effect according to the terms of the contract, but, being an affirmative defense, the burden of proof is upon the insurance company, and the evidence on this point must outweigh the evidence of the plaintiff, citing
>
> Home Benefit Ass'n vs. Sargent, 142 U. S. 641."

We have thus far discussed decisions from this Court and from Circuit Courts of Appeal. In view of the position assumed by petitioner we believe it important to invite attention to the statutes of Montana regarding presumptions, as well as decisions construing the same.

Our statute declares the disputable presumption:

> "That official duty has been regularly performed."
> Sec. 10606 (15) R. C. M. (1935.)

Presumptions are classified as indirect evidence.

Sec. 10600 R. C. M. (1935.)

The Supreme Court of Montana in considering the foregoing presumption, said:

> "While this is a disputable presumption, it has the *effect of evidence.*" (Italics supplied.)
>
> State vs. District Court, 72 Mont. 213, 232 Pac. 201, 203 (3)

and in

Union Bank & Trust Co. vs. State Bank, 103 Mont. 260, 62 Pac. (2d) 677, 684,

our Court said:

> "We recognize the rule that a presumption has the effect of evidence and that whether sworn testimony to the contrary is sufficient to rebut it is a question for the triers of fact."

Our code further declares:

> "The jury, subject to the control of the Court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the Court on all proper occasions.
>
> They are not bound to decide in conformity with the declaration of any number of witnesses, which do not produce conviction in their minds, against a less number, or *against a presumption* or other evidence satisfying their minds." (Italics supplied.)
>
> Sec. 10672 (2) R. C. M. (1935.)

Our research does not disclose any interpretation of the foregoing statute by the Montana courts, but California has an identical statute, and in a very early case had occasion to consider the effect of this provision in the case of

People vs. Milner, 54 Pac. 833, 837; 122 Cal. 171,

wherein it is said:

> "By section 2061 of subdivision 2 of the Code of Civil Procedure, jurors are to be instructed 'that they are not bound to decide in conformity with the

declarations of any number of witnesses which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds.' In this is a distinct recognition of the fact—*First, that a presumption is evidence; and, second, that it is evidence which may outweigh the positive testimony of witnesses against it.* It has been said that disputable presumptions are allowed to stand, not against the facts they represent, but in lieu of proof of the facts, and that when the fact is proven contrary to the presumption no conflict arises, but the presumption is simply overcome and dispelled." (Italics supplied.)

The foregoing rule was quoted with approval in

Reclamation Dist. vs. Sherman, 105 Pac. 277, 285 (Calif.), 11 Cal. App. 399.

In concluding this phase of our brief we urge that the decision of the Circuit Court of Appeals herein is in accord with the cases of

Travelers' Insurance Company vs. McConkey, 127 U. S. 661;

Home Benefit Association vs. Sargent, 142 U. S. 691;

Pythian Knights Council vs. Beck, 181 U. S. 49,

and particularly do we urge that the language of the Circuit Court of Appeals in

New York Life Insurance Company vs. Ross, 30 Fed. (2d) 80,

applies to the facts herein. The foregoing cases are conclusive against the contention of petitioner herein.

The foregoing discussion has been upon the merits. We now desire to urge upon the Court that petitioner is not entitled to urge error in the giving of the instructions for the reason that exceptions thereto were not taken within the presence of the jury as provided by the rules of this Court and those of the Circuit and District Courts.

In connection with these objections we invite the Court's attention to the proceedings had upon the trial of this case.

Upon the close of the evidence and to guide counsel in their arguments to the jury, the Court advised counsel what instructions it intended to give upon the main issues involved in the case. The proceedings had thereon are found (pages 244-248 R.).

These proceedings were in no wise statutory or in compliance with any rules of court, and any exceptions taken thereto are without avail to appellant upon this appeal.

After argument by counsel (253 R.), the Court instructed the jury, which said instructions are found on pages 253-268 R. Thereafter the record shows the following proceedings as having taken place:

"Immediately after the Court had directed the jury to retire in charge of the bailiff, and as the jury was leaving the box, J. A. Poore, one of counsel for defendant, arose, and the Court inquired if the defendant had any exceptions to the charge of the Court. Mr. Poore answered, 'Yes, your honor,' and immediately and while the jury was retiring, proceeded to and did commence to dictate into the record, but did not conclude the fol-

lowing exceptions to the charge of the Court." (269 R.)

From this it will be seen that any objections made or exceptions taken, while commenced while the jury was leaving the jury box, were not taken in the presence of the jury. The plaintiff served her objections to a consideration by the Court of any exceptions taken by counsel for defendant by moving to strike from the bill of exceptions all reference to the settlement of the instructions which motion was by the Court denied (313 R.), and also proposed amendments to defendant's proposed bill of exceptions, which said amendments would have eliminated from said proposed bill of exceptions all reference to exceptions or objections in the instructions of the Court (317 R.), and which said amendments to the proposed bill of exceptions were likewise refused and denied by the Court (317 R.). Plaintiff duly served, filed and had settled her bill of exceptions to such Orders of the Court. (312-318 R.).

In this connection we invite the Court's attention to the Clerk's minute entry showing the actual facts (320-321 R.). This minute entry reads, "Thereupon, after the arguments of counsel and the instructions of the Court, the jury retired to consider of its verdict.

"Defendant thereupon renewed its exceptions heretofore made." * * *

The foregoing facts conclusively establish that petitioner is not entitled to urge as error any objections or exceptions to the Court's instructions. In this connection we invite the Court's attention to the following rules:

RULES OF COURT

The rules of Court applicable are Rule 8 of the Rules of the Supreme Court of the United States.

Rule 10 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Rule 58 of the Rules of Practice of the United States District Court of Montana, which reads:

> "Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the Court, *before the jury have retired to consider of their verdict,* that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the Judge shall note such exceptions in the minutes of the trial or cause the reporter (if one is in attendance) so to note the same."

Rule 75 of the Rules of Practice of that Court provides:

> "In settling the bill the Judge * * * must strike out of it all irrelevant, unnecessary, redundant * * * matter."

In

> Simkins Federal Practice (1934), section 178, at pp. 132, 133,

it is said:

> "Exceptions to a charge, given or refused, must be taken before the jury retire. The trial judge is under no duty to recall the jury to permit exceptions to be taken, and *cannot waive the requirement. Exceptions taken after the jury retire are too late.*" (Italics supplied.)

COURT DECISIONS

Fasulo vs. United States (C. C. A. 9th), 7 F. (2d) 961;
Howland vs. Beck (C. C. A. 9th), 56 F. (2d) 35;
Seabolt vs. U. S. (C. C. A. 4th) 44 F. (2d) 169;
Eldred vs. U. S. (C. C. A. 4th) 44 F. (2d) 170.

In

Fairmount Glass Works vs. Cub Fork Coal Co., 287 U. S. 474, 77 L. Ed. 439, 53 S. Ct. 252,

the Court said:

"Under the rules of both the Court of Appeals and this Court, *the exception taken after the jury retired came too late to furnish a basis for review.*" (Italics supplied.)

See also

Tannin Co. vs. J. F. Moser Co., 288 Fed. 725, 730.

In

8 Enc. of Plead. & Pract., 264,

the rule is stated:

"Exceptions to instructions given should be taken at the close of the charge and *before the jury retires,* otherwise, they will be too late."

This rule was cited with approval in

Rumley vs. U. S., 293 Fed. 532, 556;
Cudahy Packing Co. vs. Luyben, 9 Fed. 32, 36;
Miller & Lux vs. Petrocelli, 236 Fed. 846, 852.

In

Greene vs. U. S., 154 Fed. 401, 412,

is found a review of the authorities in which the question here involved was under consideration, and in the course of its opinion the Court said:

> "In reference to the general rule requiring exception to a charge to be taken before the jury leave the bar, it is said that *'the rule is mandatory. Its enforcement does not rest in the discretion of the lower court.'* "

Some contention will probably be made that the action of the trial Judge in advising counsel regarding the instructions he would give or would refuse to give and informing counsel that if they had any exceptions they should be taken at that time misled counsel, but, we submit, that the trial court could not waive rule 10, and in this connection we call the Court's attention to the following cases:

In

St. Clair vs. United States, 154 U. S. 134, at page 153,

the Supreme Court of the United States held that:

> "What is necessary to be done * * * in order that the action of the trial court upon any particular question or matter may be reviewed 'depends upon the acts of Congress and *the rules of practice* which this Court recognizes as essential in the administration of justice. Such is the result of our decisions." (Italics supplied.)

> "The question of the method of reserving exceptions as a basis for a writ of error on appeal in the Federal Court is one dependent *upon the rules established* in the Federal Courts." (Italics supplied.)

Swift & Co. vs. Daly, 44 Fed. (2d) 40.

TRIAL COURT MAY NOT WAIVE ENFORCEMENT OF RULES OF APPELLATE COURT.

In

Allison vs. Standard Air Line Inc. (1933) 65 F. (2d) 668,

it was held that the trial court could not waive rule 10, supra, of the Circuit Court of Appeals for the Ninth Circuit. The Court said:

> "It is true that in the instant case the Court invited counsel to state their exceptions 'in as informal a manner as you wish.' There are two answers, however, to any argument that may be based upon this ill-advised concession on the part of the court: First, lack of formality does not mean lack of clearness, and, second, *the lower court has no power to waive the enforcement of the rules of this court.* (Italics supplied.)

See, also,

Merchants' Exchange Bank vs. McGraw (decided 1896) 22 C. C. A. 622, 76 Fed. 930, at pp. 935, 936.

Western Union Tel. Co. v. Baker (decided 1898) 29 C. C. A. 392; 85 Fed. 690.

Arizona & N. M. Ry. Co. v. Clark (decided 1913), 125 C. C. A. 305, 207 Fed. 817, at pp. 823, 824.

Petitioner will contend:

(1) That having commenced its objection to the charge before the jury retired this was a compliance with the rule;

(2) That the action of the trial court in advising that exceptions should be taken at that time, waived the en-

forcement of the rules that the objections should be taken before the jury retired.

In effect, petitioner contends that the phrase *"before* the jury retires" appearing in the above rules of court means *"after* the jury retires" or "during the time the jury is retiring," or *"during* the time the jury is considering its verdict," or *"before* the jury is discharged."

The above rules of court are clear and explicit.

When the Supreme Court of the United States says "before" it means "before"—not "after."

When the Circuit Court of Appeals directs that the excepting must be stated *"before* the jury retires" it does not intend thereby *"after* the jury retires."

When this Court, in its rules ordered the parties to state their exceptions "to the Court, *before* the jury have retired to consider of their verdict" it did not order nor intend to order that such exceptions may be stated to the Court *during the time the jury is retiring* or *after* the jury have retired to consider of their verdict.

Before the jury retires is a different time than *after* the jury have retired.

"Before the jury retires" simply means preceding in time or previous to the time when the jury shall have retired to consider of their verdict.

The rules using the phrase "before the jury retires" most certainly may not be construed to mean *after* the jury have retired or subsequent to the time when the jury have retired.

It is clear that the rules of court require that the exceptions to the charge be stated before the jury retires from the court room. It is certain that the petitioner

herein neglected and failed to state its exceptions to the charge herein until after the jury had retired.

Such exceptions were not timely stated and neither the oral charge nor the purported exceptions thereto should have been inserted in the bill of exceptions and petitioner should not, under the circumstances, be heard to urge error in the giving of instructions.

In concluding our brief, respondent contends that the decision of the Circuit Court of Appeals herein was and is in accord with the law as announced in

Travelers' Insurance Co. vs. McConkey, 127 U. S. 661;

Home Benefit Association vs. Sargent, 142 U. S. 691,

that such rule of law has never been modified, or overruled, and because the same has remained as such during the intervening years the rule of "stare decisis" compels the denial of the petition herein.

A rule of law once fixed by the Court should be firmly adhered to unless clearly erroneous.

Gilman vs. Philadelphia, 3 Wall. 713.

In addition, we further contend that this Court, under facts almost identical with those here presented, has refused to review the action of the Circuit Court of Appeals of the Sixth Circuit in following the rule as announced in Travelers' Insurance Company vs. McConkey.

See

New York Life Ins. Co. vs. Ross, 279 U. S. 852,

which should preclude petitioner herein from again presenting the identical question presented in said case.

And lastly—petitioner, by failing to follow the rules of this Court, the Circuit Court of Appeals and District Court in saving its exceptions to the charge of the court, was without right to urge as grounds for reversal of the judgment herein, error, if any, in the Court's instructions.

The petition herein should be denied.

Respectfully submitted,

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Service of the within and foregoing Brief by copy admitted this.....day of September, 1937.

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